



**Njoroge v Nyagisera (Civil Appeal E464 of 2022)
[2024] KEHC 5163 (KLR) (Appeals) (17 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5163 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

APPEALS

CIVIL APPEAL E464 OF 2022

HI ONG'UDI, J

MAY 17, 2024

BETWEEN

PETER GITHERU NJOROGE APPELLANT

AND

OBED ONDUSU NYAGISERA RESPONDENT

(Being an appeal from the Judgment and decree of D. S Aswani Resident Magistrate in Milimani Small Claims Court SCCC No. E237 of 2022, delivered on 6th June 2022)

JUDGMENT

1. This appeal arises from a judgment and decree entered in Small Claims Court SCCC No. E237 of 2022. In the said suit, the appellant (who was the claimant) sued the respondent (who was the 1st respondent) for compensation for loss or damage to property valued at Kshs. 232,560/= arising from a road traffic accident.
2. The respondent was the driver of the motor vehicle registration No. KDC 445A Nissan Station Wagon which allegedly hit the appellant's motor vehicle number KCA 245E. The claim was not defended and it therefore proceeded for formal proof against the respondent. The trial magistrate delivered Judgment on 6th June, 2023 in which she found the respondents 100% liable for the accident. She also awarded special damages amounting Kshs. 15,000/= which was proved but declined to award Kshs. 207, 060/= on the grounds that the same was not proved.
3. The appellant being aggrieved by the whole judgment lodged this appeal on 28th June, 2022 setting out the following grounds:
 - i. That the learned trial magistrate erred in fact and in law in failing to consider the receipts attached in the filed list of documents.



- ii. That the learned judge (*sic*) erred in law and in fact and in law in failing to consider and appreciate the submissions made by the appellant in the trial court.
 - iii. That the learned Judge (*sic*) erred in law by holding that the appellant had failed to prove its claim of Kshs. 232,560/= on a balance of probabilities.
4. The Appeal was canvassed through written submissions.

Appellant's Submissions

5. The appellant's submissions were filed by the firm of Samuel Nyambane Advocates and are dated 14th March, 2024.
6. On the first ground, counsel submitted that the trial Magistrate erred in fact and in law in failing to consider the receipts attached in the filed list of documents. He urged the court to consider the record of appeal and in particular page 9 of the record of appeal where the assessors report opined that a sum of Kshs. 207,060 would be incurred to repair the motor vehicle. Further, that a sum of Kshs. 10,000/= incurred by the appellant in legal costs for the demand letter was not factored by the trial magistrate. He added that the invoice by Ontime Technical Solutions limited (at page 22 & 23) confirmed the expenses incurred by the appellant.
7. On the second ground counsel submitted that the trial court failed to consider and appreciate the submissions made by the appellant in that the court failed to consider the two authorities cited by the appellant. The said authorities included; *Gerda Maria Simon vs. Global Trucks Ltd* [2020] eKLR and *David Bagine vs. Martin Bundi* Civ. App. No. 283 of 1996 where both courts found that the assessors report was sufficient proof and the failure to provide receipts for any repairs done was not fatal to the claim.
8. Further, the court's attention was drawn to the case of *Silas Mutua Mberia v Muthoni Njue Veronica* [2021] eKLR where the court also made a finding that an assessor's report was sufficient proof for a material damage claim. The court held as follows:

“It's thus clear that the appellant only needed to prove the extent of the damage to his motor vehicle and what it would cost to repair it without necessarily proving that, the repairs were actually done and paid for. It must always be remembered that the balance of proof on the appellant was at all times on a balance of probabilities and not higher. The claim by the appellant was not for an expense already incurred but a claim to restore his damaged motor vehicle to Its pre-accident state. The value of the damage was assessed and a report produced in evidence. The appellant was not legally required or obligated to specifically prove the claim by production of receipts like in the case of special damages...”
9. On the 3rd ground, counsel submitted that the appellant in proving the said claim relied on the report by Strategic Automobile Assessors & the invoice from Ontime Technical Solutions Limited. As held in *Silas Mutua Mberia v Muthoni Njue Veronica* (*supra*) the appellant was not legally required or obligated to specifically prove the claim by production of receipts like in the case of special damages.
10. Lastly, on costs counsel submitted that costs follow the event. That the appellant being the successful party herein she urged the court to award him costs for both the appeal and the lower court suit.
11. The respondents did not file any submissions.



Analysis and Determination

12. This being a first appellate court, I am guided by the dictum in the case of *Selle vs. Associated Motor Boat Co. Ltd. & others* [1968] EA 123, where it was held that the first appellate court has to re-consider and re-evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the circumstances. Also see: *Kamau v Mungai & another* [2006] I KLR 150.
13. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that;

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”
14. Upon analyzing the facts, evidence and the submissions tendered by the appellant, I find one issue arising for determination which is Whether the respondent proved his claim for Kshs. 232,560/= as special damages.
15. In addressing the issue as stated above, during hearing the appellant testified that the assessor did an assessment of Kshs. 207,060 as the expense for repair of the vehicle. In the appellant’s submissions, it was argued that the learned trial magistrate erred in fact and in law in failing to consider the receipts attached in the filed list of documents. Further, that a sum of Kshs. 10,000/= incurred by the appellant in legal costs for the demand letter was not factored by the trial magistrate. Additionally, that the appellant in proving the said claim had relied on the report by Strategic Automobile Assessors & the invoice from Ontime Technical Solutions Limited.
16. In the impugned Judgment it was held that the appellant failed to prove that the repair costs were indeed incurred. The court therefore awarded towing charges of Kshs. 10,500/= and assessment fees of Kshs. 5,000/= which was proved.
17. This court upon perusal of the records found only four receipts produced as evidence in support of the appellant’s claim for Kshs. 10,500/=: Kshs. 5,000/=: Kshs.10,000/= and Kshs. 550 being towing fees, accident assessment fees, demand letter fees and motor vehicle search fees respectively. The other documents produced in support of the appellant’s other claims are in form of invoices and motor vehicle assessment report.
18. In *Nkuene Dairy Farmers Co-operative Society & Another vs. Ngacha Ndeiya* [2010] eKLR, this Court held:

“In our view special damages in a material damage claim need not be shown to have actually been incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage complained of. An accident assessor gave details of the parts of the respondent’s vehicle which were damaged. Against each item he assigned a value. We think the particulars of damage and the value of the repairs were given with some degree of certainty.”



19. The same Court in an earlier judgment in *David Bagine vs. Martin Bundi* [1996] eKLR, in asserting the probative value of an Assessor's Report reiterated that:

“The Assessor's report was sufficient proof and the failure to provide receipts for any repairs done was not fatal to the respondent's claim.”

20. In the instant case, it is evident that the appellant's claim for cost of repairs are special damages claim in the form of material damage. The appellant herein produced as evidence photographs and the assessor's report showing the extent of material damage on his motor vehicle. I find this to have been sufficient proof. The failure to provide receipts for any repairs done was not fatal to the appellant's claim. The trial court therefore erred in finding that the appellant failed to prove that repair costs were indeed incurred, or were to be incurred.

21. The upshot is that the appeal herein is merited and is hereby allowed with costs.

22. The following orders shall issue. The lower court Judgment is hereby set aside and substituted with a Judgment of Kshs. 232,560/= plus costs. Interest at court rates from date of filing suit until payment in full.

23. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 17TH DAY OF MAY, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

